BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SCOTT BESLER	)	
Claimant	)	
VS.	)	
	)	Docket No. 236,676
SABATINI TRUST	)	
Respondent	)	
Uninsured	)	

ORDER

Respondent appeals Administrative Law Judge Bryce D. Benedict's June 30, 2000, preliminary hearing Order.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations as listed in the Submission Letter of Claimant and respondent's cover letter to the Brief of Respondent both filed on May 16, 2000, with the Division of Workers Compensation.

ISSUES

The Administrative Law Judge granted claimant's request for continued medical treatment with orthopedic surgeon Richard E. Polly, M.D., and any referrals, specifically to include the authorization for additional surgery for claimant's left wrist injury. The Administrative Law Judge denied respondent's Motion to Terminate Medical Care at Expense of Respondent.

On appeal, respondent contends the Appeals Board should reverse the Administrative Law Judge's preliminary hearing Order. Respondent contends that on claimant's date of accident, January 29, 1998, claimant was an independent contractor of respondent instead of an employee. Additionally, respondent argues that the parties are exempt from coverage under the Workers Compensation Act because on claimant's date of accident claimant was employed in an agricultural pursuit.

In contrast, claimant requests the Appeals Board to affirm the Administrative Law Judge's preliminary hearing Order. First, claimant objects to a rehearing on the independent contractor and agricultural pursuit issues. Second, claimant argues he proved

his relationship with respondent was an employer/employee relationship instead of a principal/independent contractor relationship. Third, claimant argues he proved the Workers Compensation Act does apply to the parties because claimant was not employed by respondent in an agricultural pursuit and claimant was injured while engaged in an employment activity not incident to an agricultural pursuit.

Accordingly, the three issues for the Appeals Board review on appeal are:

1. Should claimant's objection against the re-litigation of issues previously decided be sustained?

2. Was the claimant an employee or an independent contractor of respondent?

3. Does the agricultural pursuit exemption apply to the parties?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the arguments contained in the parties' briefs, the Appeals Board makes the following findings and conclusions:

INTRODUCTION

Before discussing the issues raised by the parties, the Appeals Board finds it is appropriate in this case to give a brief explanation of the facts and procedurally how the case reached this particular point in the proceedings.

The named respondent is the Frank C. Sabatini Trust. Claimant and the Frank C. Sabatini Trust, through Frank C. Sabatini, Trustee, entered into a Management Agreement dated April 1, 1997. Claimant was designated as the "Manager" and the Frank C. Sabatini Trust was designated as the "Operator." The "Operator" was engaged in the business of operating cattle and ranch land in Shawnee, Osage, and Wabaunsee counties in Kansas. The "Operator" agreed to pay the "Manager" a monthly fee of $2,940.66 to manage these ranch properties pursuant to the details set forth in the Management Agreement. The Management Agreement specified that the "Manager" was an independent contractor and not an employee of the "Operator."

Frank C. Sabatini is the trustee and beneficiary of the Frank C. Sabatini Trust which owns and operates numerous businesses through various trust agreements. All of Mr. Sabatini's business and personal interests are owned and operated through three separate trusts—one irrevocable, one revocable, and one an individual retirement account. The irrevocable trust owns all the stock and controls the MAJA Company, Inc. Although not completely clear in the record, the revocable trust owns at least part of Banc Shares, a holding company that owns Capital City Bank of Topeka, Kansas. Other businesses owned

by at least one or more of the foregoing trusts are Kentucky Pizza Huts, Citation Airways, Inc., Meridian Land and Cattle Company, S&H Cattle Company, Main Street Company, Inc., North Main Street Company, Inc., and West Main Street Company, Inc. The cattle and ranch properties owned by the Frank C. Sabatini Trust and the subject of the Management Agreement as of April 1, 1997, consisted of the following:

1. 2750 acres of grassland located in Wabaunsee County, Kansas, owned in part by the IRA Trust, MAJA Company, Inc., and the revocable trust.

2. 90 acres located in Shawnee County, Kansas, which contains 4 acres for Mr. Sabatini's residence and 1 acre for Mr. Sabatini's son's (Marc) residence. This property is also owned in part by the IRA trust, MAJA Company, Inc., and the revocable trust.

3. 140 acres located in Osage County, Kansas, owned in part by the IRA trust, the irrevocable trust, and the revocable trust.

All of Mr. Sabatini's business and personal interests are owned by these trusts entirely for the estate planning purpose of transferring the various assets owned by Mr. Sabatini through the trusts upon his death to avoid probating the trust assets. Although Mr. Sabatini pays all of his personal expenses out of the Frank C. Sabatini Trust, Mr. Sabatini is required to pay individual income taxes as if he owned the trust assets and earned the income individually.

Claimant worked for Mr. Sabatini under the Management Agreement from April 1, 1997, until Mr. Sabatini terminated the Management Agreement effective July 1, 1998. Mr. Sabatini testified that claimant was terminated because he was not completing the various work projects that he was assigned.

Before claimant was terminated, he injured his left wrist on January 29, 1998, when he was bucked off a horse owned by the respondent. After claimant was terminated, he served Mr. Sabatini, as Trustee of the Frank C. Sabatini Trust, a claim for workers compensation benefits. The claim was served on August 17, 1998. Claimant had not requested any workers compensation benefits while he was working for the respondent. Claimant received medical treatment for his left wrist injury through his personal Blue Cross/Blue Shield medical and hospital insurance policy.

The first preliminary hearing in this matter was held on December 30, 1998. At that preliminary hearing, claimant and Phillip Paxin, a person hired by claimant while he worked for respondent to perform work on the ranch, and Frank C. Sabatini testified. The issues were whether claimant was an employee of respondent or an independent contractor and, if claimant was an employee, whether claimant was employed in an agricultural pursuit and thus exempt from coverage under the Workers Compensation Act.

As a result of that preliminary hearing, the Administrative Law Judge found claimant was an employee of the respondent and not an independent contractor. The Administrative Law Judge further found that claimant was employed in an "agricultural pursuit" but claimant's injury occurred in an employment activity not incident to the agricultural pursuit. Accordingly, the Administrative Law Judge concluded that claimant's accident was covered by the Kansas Workers Compensation Act and ordered respondent to provide medical treatment for claimant's left wrist injury.

Respondent timely appealed that preliminary hearing Order to the Appeals Board. But the attorney who was then representing respondent dismissed the appeal before the Appeals Board had an opportunity to decide the case. Respondent then changed attorneys and employed Mr. James C. Wright as its attorney and Mr. Wright is presently representing the respondent in this matter.

On February 11, 2000, claimant filed another Application for Preliminary Hearing. On March 8, 2000, a preliminary hearing was held with claimant requesting authorization for further surgery for his injured left wrist. At that time, respondent also had filed a Motion to Terminate Medical Care at Expense of Respondent. The respondent alleged since claimant's termination he had engaged in other activities that had aggravated his wrist injury and those activities were the reason for claimant's current need for surgery. Additionally, respondent alleged claimant was an independent contractor and was engaged in an agricultural pursuit at the time of the January 29, 1998, accident.

The claimant objected to re-litigating the issues of independent contractor and agricultural pursuit. Claimant argued that those issues had already been thoroughly litigated at the December 30, 1998, preliminary hearing that resulted in the January 8, 1999, preliminary hearing Order. That preliminary hearing Order was appealed and the respondent dismissed the appeal. Thus, claimant requested the Administrative Law Judge to deny respondent another opportunity to litigate those issues.

But the Administrative Law Judge permitted respondent to present evidence on the issues of independent contractor and agricultural pursuit during another preliminary hearing which was held on March 29, 2000. Additionally, after the preliminary hearing, evidentiary depositions were taken of Richard E. Polly, M.D., Frank C. Sabatini, his son Marc and Marc's wife Kelly, claimant and his wife Karen, and Patricia A. Clark, Mr. Sabatini's administrative assistant.

After the March 29, 2000, preliminary hearing and the evidentiary depositions were taken, the Administrative Law Judge had the parties submit briefs to the Administrative Law Judge before the preliminary hearing order was issued. In respondent's brief, the respondent dismissed the issue in regard to claimant's request for additional surgery. Respondent had claimant examined by orthopedic surgeon Dr. Sergio Delgado who agreed that claimant needed additional surgery and the additional surgery was directly related to his January 29, 1998, work-related accident.

Thus, the Administrative Law Judge was left with three issues to address in the preliminary hearing Order. First, should claimant's objection to respondent re-litigating the independent contractor and agricultural pursuit issues be sustained or overruled? If the Administrative Law Judge overruled claimant's objection, then the other two issues of independent contractor and agricultural pursuits would again be addressed.

1. SHOULD CLAIMANT'S OBJECTION AGAINST THE RE-LITIGATION OF ISSUES PREVIOUSLY DECIDED BE SUSTAINED?

At the second preliminary hearing, held on March 8, 2000, claimant objected to respondent raising again the issues of independent contractor and agricultural pursuit, issues already decided in the Administrative Law Judge's January 8, 1999, preliminary hearing Order. The Administrative Law Judge also questioned respondent as to what new evidence had been discovered on those two issues.

But then the Administrative Law Judge allowed respondent to present, at a subsequent March 29, 2000, preliminary hearing, evidence on those issues through the testimony of David Bosworth and additionally allowed both the claimant and respondent to take evidentiary depositions of seven witnesses to be submitted as evidence in the case before the Administrative Law Judge entered the June 30, 2000, preliminary hearing Order.

In the June 30, 2000, preliminary hearing order, the Administrative Law Judge found the respondent was not entitled to re-litigate those two issues determined in the first preliminary hearing order. The Administrative Law Judge determined the evidence was primarily cumulative and the evidence was available to the respondent at the first preliminary hearing. The Administrative Law Judge, however, then went on and decided those issues and used not only the evidence presented at the December 30, 1998, preliminary hearing but also the evidence presented at the two subsequent preliminary hearings and contained in the evidentiary depositions of the witnesses taken thereafter.

In fact, in deciding the agricultural pursuit issue, the Administrative Law Judge made a specific finding that when he entered the initial preliminary hearing order he did not understand the Frank C. Sabatini Trust "encompassed anything more than investment in pasture land." The Administrative Law Judge went on to describe the property and business interests owned by the various trusts and corporations under Frank C. Sabatini's ownership and control. The Administrative Law Judge also referenced specific pages in Frank C. Sabatini's deposition where he found these facts.

The Administrative Law Judge then concluded that the agricultural pursuit exemption did not apply to the present case because only a small part of the Frank C. Sabatini Trust business interests involved an agricultural pursuit where the general nature of the Trust business was overwhelmingly non-agricultural at the time of claimant's accident.

The Appeals Board has allowed in previous cases multiple preliminary hearings finding the Workers Compensation Act does not bind the parties by technical rules or procedure but does require that the parties be given a reasonable opportunity to be heard and present evidence, ensure expeditious hearings, and act reasonably and without partiality.[1]

The Appeals Board concludes the Administrative Law Judge permitted both the parties in this case to present extensive additional evidence on the issues of independent contractor and agricultural pursuit. The Administrative Law Judge then decided the respondent was not entitled to re-litigate those issues because the evidence produced was either cumulative or available to the respondent at the first preliminary hearing.

The Workers Compensation Act does not limit the number of preliminary hearings that can be held in a case.[2] The Appeals Board finds, because of the complexities of this case and the enormous amount of time and effort the parties have spent in litigating the issues, that claimant's objection to re-litigating issues previously decided in the case should be denied. The Appeals Board finds this conclusion is also supported by the Administrative Law Judge's own findings that new evidence contained in Frank C. Sabatini's deposition testimony clarified that Frank C. Sabatini's Trust owns and controls a multitude of businesses other than the ranch properties.

2. WAS CLAIMANT AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR OF RESPONDENT?

One of the many business interests that Frank C. Sabatini as Trustee of the Frank C. Sabatini Trust has is the ownership and operation of three agricultural properties located in Shawnee, Wabaunsee, and Osage counties in Kansas. In the summer of 1996, Mr. Sabatini decided to develop all of those properties into a first-class ranch operation. Such operation would include the purchasing of quality cattle and the construction and maintenance of facilities on the properties.

In order to accomplish this goal, Mr. Sabatini decided to hire a ranch manager for those properties. Mr. Sabatini actually hired claimant in the fall of 1996 on an hourly basis before he entered into the April 1, 1997, Management Agreement. Also, before the Management Agreement was entered into by the parties, Mr. Sabatini, in a letter dated March 24, 1997, to claimant, outlined claimant's specific job responsibilities and projects Mr. Sabatini expected claimant, as the ranch manager, to complete. Many of the duties outlined were caretaking duties for Mr. Sabatini's house and immediate surrounding yard located on the 90-acre Shawnee County property. Those duties included raking leaves,

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[1] *See* K.S.A. 1999 Supp. 44-523(a).

[2] *See* K.S.A. 1999 Supp. 44-534a.

mowing the lawn, fertilizing the lawn, picking up trash, and assisting Mr. Sabatini's wife in maintaining her flower beds and gardens.

After the April 1, 1997, Management Agreement was signed, claimant was paid a monthly management fee of $2940.66. The monthly management fee contained $290 which was paid to claimant to reimburse him for the cost of his Blue Cross/Blue Shield medical and health insurance policy. The Management Agreement specifically set out that claimant was an independent contractor and was not an employee of respondent. Concerning this issue, there is conflicting testimony in the record as to whether claimant requested this clause or whether Mr. Sabatini, as the drafter of the agreement, desired claimant to be an independent contractor. Even if claimant did request, as verified by Mr. Sabatini and Patricia Clark, that he wanted to be treated for tax purposes as an independent contractor, that is not determinative of whether claimant is an independent contractor pursuant to the Workers Compensation Act.

The Appeals Board finds that respondent's principal argument concerning the issue of independent contractor is that the Management Agreement specifically designates claimant as an independent contractor and claimant requested such designation. But the relationship of the parties depends upon all the facts and the label they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.[3] The primary test used by the courts in determining whether the employer/employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed. It is not the actual interference or exercise of the control by the employer but the existence of the right or authority to interfere or control that renders one a servant rather than an independent contractor.[4] In addition to the right to control and the right to discharge a worker, other commonly recognized factors for determining whether a worker is an employee or an independent contractor are: (a) the existence of a contract to perform a certain piece of work at a fixed price; (b) the independent nature of the worker's business or distinct calling; (c) the employment of assistants and the right to supervise their activities; (d) the worker's obligation to furnish tools, supplies, and materials; (e) the worker's right to control the progress of the work; (f) the length of time the worker is employed; (g) whether the worker is paid by the time or by the job; and (h) whether the work is a part of the regular business of the employer.[5]

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[3] *Knoble v. National Carriers, Inc.,* 212 Kan. 331, 337, 510 P.2d 1274 (1973).

[4] *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, Syl. ¶ 5, 689 P.2d 787 (1984).

[5] *McCubbin v. Walker*, 256 Kan. 276, 280-81, 886 P.2d 790 (1994).

The Administrative Law Judge found claimant was an employee of the respondent and was not an independent contractor. The Appeals Board agrees and concludes that on claimant's January 29, 1998, accident date, the record contains evidence that respondent had the right to control and exercised that right over claimant making claimant an employee of respondent. This conclusion is based on the following facts, but not limited thereto:

A. Claimant was paid not according to a certain piece of work or project completed but was employed on a continuing monthly basis.

B. Although generally respondent did not at all times specifically instruct claimant on how to perform the jobs needed to be completed, the respondent, however, did specifically give instructions to claimant on what jobs were needed to be completed and the order in which to do them.

C. Claimant had the authority to hire other employees and subcontractors but respondent wanted to know who claimant hired and in most cases suggested or told claimant which subcontractor to hire.

D. In December 1997, respondent required claimant to report weekly a detailed summary of what specific job duties claimant performed daily.

E. Although it was respondent's position that claimant had the option to either hire or subcontract any and all of the specific job responsibilities of the ranch manager and only supervise the completion of those job responsibilities, the evidence contained in the record established that respondent on numerous occasions instructed claimant to actually perform the job instead of hiring workers or subcontractors to perform the job. On many occasions Mr. Sabatini requested claimant to perform specific job duties around his personal residence and for his family on an on-call basis.

F. Claimant was expected to, and did, work some 50 to 60 hours per week and only worked on his own ranch or any other personal projects after regular working hours.

G. Respondent specified that claimant was to have the holiday schedule of days off in accordance with the Capital City Bank schedule and claimant also received free checking account services as did the regular employees of the bank.

H. If claimant needed a day off for any personal reason, he was required to ask the respondent for the day off.

I. Claimant used some of his own hand tools and farm equipment to complete his job duties as ranch manager but also was furnished by the respondent with certain tools and equipment to complete his job assignments such as the use of a truck, horses, and other miscellaneous farm equipment that included mowers.

In its brief to the Administrative Law Judge, citing, *Marley*, a recent Court of Appeals opinion as authority, the respondent also argued that claimant was estopped from claiming he was an employee in pursuit of a workers compensation claim.[6] The Administrative Law Judge found *Marley* did not apply because the facts were materially different from the facts in this case. The Appeals Board agrees with the Administrative Law Judge's conclusion.

In *Marley*, the claimant entered into an agreement with the respondent that specified the relationship between the respondent and the claimant was that of the carrier and independent contractor and not an employer/employee relationship. Claimant had the option of obtaining coverage through a workers compensation policy or through the respondent's truckers occupational accidental insurance. Claimant decided to be covered as an independent contractor under the occupational accident insurance policy.

Claimant sustained an accidental injury while in the course of his employment while working under the agreement with respondent. Claimant applied for benefits through the occupational accident policy and was paid $8,757.13 in medical benefits and $31,199.94 in disability benefits. The claimant certified on the application for the benefits that he was not an employee of the respondent.

Claimant then filed a claim for workers compensation benefits alleging he was an employee of the respondent and not an independent contractor. The court found it was not permissible for a claimant in a workers compensation action to change his position to claim he was an employee of the respondent at the time of the injury where the claimant had previously taken advantage of his representation that he was an independent contractor and not an employee. The court went on to hold that claimant was estopped to deny he was an independent contractor at the time of his injury and, as a result, he was not entitled to workers compensation benefits.[7]

Here, the Management Agreement between claimant and respondent does designate claimant as an independent contractor. But the agreement does not give claimant a choice between workers compensation coverage and an occupational accidental insurance policy coverage. Respondent did reimburse claimant for his monthly cost of his Blue Cross/Blue Shield policy. But there is no evidence that this policy provided, in addition to medical benefits, disability benefits. Also, there is no evidence that claimant certified he was an independent contractor and not an employee in order to receive those medical benefits. In many workers compensation cases, when employers refuse to provide medical treatment for an injured worker, an injured worker is forced to utilize his private

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[6] *Marley v. M. Bruenger & Co., Inc.*, 27 Kan. App. 2d 501, 6 P.3d 421, *rev. denied* ___ Kan. ___ (2000).

[7] *Marley* at 505.

health insurance in order to receive treatment. At the time claimant was injured he was in need of medical treatment and claimant's only recourse was to obtain medical treatment through his private health insurance company. The Appeals Board finds the facts of this case are materially different from *Marley* where the claimant certified himself as an independent contractor in order to receive both medical and disability benefits. Claimant then turned around and claimed the same benefits from another insurance carrier under the Workers Compensation Act.

3. DOES THE AGRICULTURAL PURSUIT EXEMPTION APPLY?

Having found that claimant was an employee of the respondent, the next issue is whether claimant was employed by the respondent in an agricultural pursuit and thus exempt from coverage by the Workers Compensation Act. In 1974, the legislature amended the Act as follows, "the workmen's compensation act shall apply to all employments wherein employers employ workmen within this state except that such act shall not apply to: (1) Agricultural pursuits and employments incident thereto . . . ." The 1974 amendment also provided for an exemption for those employers who have payroll of less than $10,000 in the preceding year.[8]

Before the 1974 amendment, the Act applied only to employments in hazardous trades or businesses designated in the statute. Agricultural pursuits and employments incident thereto were declared to be nonhazardous and were exempt from the provision of this Act.[9] The Kansas Legislature has not provided a statutory definition of "agricultural pursuits" in the Act. Thus, the Kansas courts have been left to determine the question on a case-by-case basis. Additionally, since the 1974 amendment included all employments with the agricultural pursuit being one of the exceptions, the cases addressing the definition of an agricultural pursuit before that amendment are no longer controlling.[10]

The Kansas Court of Appeals adopted a three-part test for determining whether a specific pursuit or business is an agricultural pursuit within the meaning of K.S.A. 1985 Supp. 44-505(a)(1):[11]

A. The general nature of the employer's business.

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[8] L. 1974, ch. 203, § 4.

[9] K.S.A. 44-505(a)(Weeks).

[10] *Frost v. Builders Service, Inc.*, 13 Kan. App. 2d 5, 10, 760 P.2d 43, *rev. denied* 243 Kan. 778 (1988).

[11] The statute in effect on claimant's January 29, 1998 accident date was K.S.A. 1997 Supp. 44-505(a)(1). This version is the same except for non-substantive word changes.

B. The traditional meaning of agriculture as the term is commonly understood.

C. Each business will be judged on its own characteristics.[12]

In *Witham*, the claimant was injured while holding a horse while a veterinarian took a blood sample. The trial court found the respondent was not engaged in an agricultural pursuit. The Court of Appeals applied the three-part test, finding first that the general nature of respondent's business was boarding and showing other people's horses. Second, the court concluded that the traditional meaning of agriculture would probably not include boarding and showing other people's horses. Moreover, the ordinary farmer typically did not show and board horses. Finally, the court concluded the respondent was primarily engaged in a commercial enterprise which entailed providing services for other people's horses. The court held that the work being done by claimant at the time of his injury was not an agricultural pursuit and the claimant was covered under the Workers Compensation Act.[13]

In a later case, the Court of Appeals held that when the respondent raises the agricultural pursuit defense the court must follow a two-step analysis. First, the Court must determine whether the employer was engaged in an agricultural pursuit using the three-part test set forth in *Witham*. If the answer is "yes," then the Court must proceed to the second step which is to ascertain if the accident occurred while the employee was engaged in an employment incident to the agricultural pursuit. If the answer is "yes," then the employee is not covered by the Act. If the answer is "no," there is coverage.[14]

In *Frost*, the claimant was injured while hooking up a horse trailer to take it to a livestock area on a farm. Claimant was employed as a construction foreman for a construction company whose primary stockholder was also the owner of the farm where claimant was injured. The court found that it could not be denied that claimant was injured on a farm and was performing work incident to the farming operation at the time of his injury. But the court went on to hold that when the *Witham* test was applied to the facts of the case, claimant was primarily employed by the construction company at the time of his injury and the construction company was not primarily engaged in an agricultural pursuit.

In this case, the Administrative Law Judge found the general nature of the Frank C. Sabatini Trust's business interests were nonagricultural. The Trust's agricultural business was only a small part of the total Trust assets and business interests. Based on that analysis, the Administrative Law Judge found claimant was not employed in an agricultural pursuit at the time of his accident.

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[12] *Witham v. Parris*, 11 Kan. App. 2d 303, Syl. ¶ 3, 720 P.2d 1125 (1986).

[13] *Witham* at 307.

[14] *Frost* at 10 and 11.

The Administrative Law Judge went on to find that claimant's accidental injury also did not occur while he was engaged in an employment incident to an agricultural pursuit. Although disputed, the Administrative Law Judge found that claimant was injured while exercising a horse for Mr. Sabatini's daughter-in-law to ride. Even if claimant was not exercising the horse for Mr. Sabatini's daughter-in-law to ride, the evidence is clear that claimant had the daily responsibility of feeding the horses kept at the Shawnee property and also had the responsibility of weekly exercising the horses. The Administrative Law Judge found the horse that bucked off and injured claimant was owned only for pleasure riding. The Administrative Law Judge concluded that claimant was not injured while engaged in an activity incident to an agricultural pursuit.

The Appeals Board disagrees with the Administrative Law Judge's analysis and the claimant's argument that claimant was injured while he was not employed in an agricultural pursuit and, further, claimant's injury did not occur in an employment incident to an agricultural pursuit.

Agricultural pursuits were first exempt from the Workers Compensation Act because the legislature declared such activity nonhazardous.[15] But statistics show that agriculture is one of the most hazardous of all occupations.[16] Some would argue the reason the agricultural pursuit exemption remains in the statute is not to burden the thousands of small farmers that are located in Kansas from the costs of requiring the farmers to carry workers compensation insurance and the practical administrative difficulties necessarily associated with employers who are covered by the Workers Compensation Act. But the amendments that were made to the Act in 1974 accomplished the exemption of small farmers from the Act by limiting covered employment that had a yearly payroll less than $10,000, and presently less than $20,000.[17] The Appeals Board finds it is reasonable to conclude that the intent of the agricultural pursuit exemption not only applies to business entities that are primarily engaged in agricultural pursuits but also applies to business entities that are not primarily engaged in agricultural pursuits but employ employees primarily in an agricultural pursuit. In making the analysis of whether the agricultural pursuit exemption applies, the decisive question is the nature not of the employer's business but of the employee's employment.[18]

Although claimant was required to perform caretaker type duties for respondent and other personal duties for Mr. Sabatini, the Appeals Board concludes that at the time of claimant's accident on January 29, 1998, he was primarily employed by the respondent

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[15] K.S.A. 44-505(a) (Weeks).

[16] *See Larson's, Workers' Compensation Law*, Vol. 4, Sec. 75.02 (2000).

[17] K.S.A. 1997 Supp. 44-505(a)(2).

[18] *See Larson's, Workers' Compensation Law*, Vol. 4, Sec. 75.03 [2] (2000).

performing duties as a ranch manager raising cattle for profit and either constructing agricultural buildings and fences or maintaining agricultural buildings and fences on the respondent's ranch properties. The Appeals Board acknowledges that the Frank C. Sabatini Trust and Frank C. Sabatini as Trustee own and operate many businesses and the ranch properties are a small part of this whole business activity. But claimant was hired to primarily perform duties connected with the ranch properties. Claimant never performed job duties in connection with the Frank C. Sabatini Trust's other business interests, except to the extent the ranch properties were also used as residences for the Sabatini family. Nevertheless, the ranch properties themselves were used in connection with the cattle operation and the feeding and raising of livestock is construed as an agricultural pursuit.[19] Accordingly, the Appeals Board concludes the nature of the business for which respondent employed claimant was an agricultural pursuit.

Additionally, the Appeals Board concludes claimant's accidental injury occurred while engaged in an employment activity incident to an agricultural pursuit. Claimant was charged with the responsibility of feeding and exercising respondent's horses. Respondent used the horses for recreational purposes but had used the horse claimant was riding when he was injured at least on one occasion to work cattle. Also, it was respondent's intent to utilize horses for the purpose of working cattle as the cattle herd increased and facilities were constructed at the Wabaunsee property. The Appeals Board finds it is reasonable for a ranch manager to have the responsibility of caring for horses, whether the horses are used for recreational purposes or for the purpose of working cattle, in conjunction with his primary duties of caring for cattle and the ranch facilities. Thus, since claimant was injured while performing those duties, the injury occurred while claimant was engaged in an employment activity incident to an agricultural pursuit.

In this case, if the respondent would have required claimant to perform some type of work activity for the bank and claimant had been injured while performing the bank activity then claimant would not have been injured performing an activity incident to an agricultural pursuit. But the caring for and the exercising of horses on a cattle ranch is an activity incident to the agricultural pursuit of raising cattle and caring for the ranch facilities.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Bryce D. Benedict's June 30, 2000, preliminary hearing Order is reversed and the Appeals Board finds the Workers Compensation Act does not apply to the parties because the agricultural pursuit exemption applies.

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[19] K.S.A. 47-1502.

IT IS SO ORDERED.

Dated this ____ day of March 2001.

BOARD MEMBER

c: Derek J. Shafer, Topeka, KS
James C. Wright, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director